Supreme Court, U.S.
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No. 99-614

In The

Supreme Court of the United States

TIPP-IT, INC., A Nebraska Corporation,

Petitioner,

vs.

MARTIN J. CONBOY, City Prosecutor
Omaha, Douglas County, Nebraska,

Respondent.

On Petition For Writ Of Certiorari To The Nebraska Supreme Court

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PAUL D. KRATZ #12318
City Attorney
ALAN M. THELEN #17811
Assistant City Attorney, *Counsel of Record*
804 Omaha/Douglas Civic Center
1819 Farnam Street
Omaha, Nebraska 68183
(402) 444-5135
Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Were the three works at issue obscene, as defined by Neb. Rev. Stat. §25-807(10) (Reissue 1995)?

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CONSTITUTIONAL AND STATUTORY PROVISIONS

First Amendment to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Neb. Rev. Stat. §28-807(10) (Reissue 1995) provides:

> Obscene shall mean (a) that an average person applying contemporary community standards would find that the work, material, conduct, or live performance taken as a whole predominantly appeals to the prurient interest or a shameful or morbid interest in nudity, sex, or excretion, (b) the work, material, conduct, or live performance depicts or describes in a patently offensive way sexual conduct specifically set out in sections 28-807 to 28-829, and (c) the work, conduct, material, or live performance taken as a whole lacks serious literary, artistic, political, or scientific value.

Neb. Rev. Stat. §28-807(15) (Reissue 1995) provides:

> Sexual conduct shall mean acts of masturbation, homosexuality, sodomy, sexual intercourse, or prolonged physical contact with a person's clothed or unclothed genitals, pubic area, or buttocks or, if such person is female, breasts.

Neb. Rev. Stat. §28-820 (Reissue 1995) provides:

> Any person who exhibits, sells or distributes, or is about to exhibit, sell or distribute or has in his or its possession with intent to sell or distribute,

> or is about to acquire possession with intent to exhibit, sell or distribute, any work, material, conduct or live performance shall, if such person has genuine doubt as to the question of whether such work, material, conduct or live performance is in fact within the terms and provisions of sections 28-807 to 28-829, have the right to bring an action in the district court for declaratory judgment under the Uniform Declaratory Judgments Act against the appropriate chief law enforcement officer of the city, village or county in which the work, material, conduct or live performance is located or is intended to be disseminated, distributed, or exhibited, for a judicial determination as to whether or not such work, material, conduct or live performance is obscene. Any such action may be consolidated with a pending action brought under the provisions of sections 28-816 to 28-818, and the defendant in any action brought under this section may seek a declaratory judgment or request a temporary restraining order or an injunction therein in accordance with the provisions of sections 28-816 to 28-818.

STATEMENT OF THE CASE

Tipp-It, Inc. (hereinafter the "Plaintiff") filed the present action under Nebraska Revised Statutes §28-820 (Reissue 1995), seeking a declaratory judgment that certain art works were not obscene as defined by Neb. Rev. Stat. §28-807(10) (Reissue 1995). (Petition for Writ of Certiorari, Appendix p. 44). The petition was filed against Martin J. Conboy, City Prosecutor for the City of Omaha (hereinafter the "Defendant"). The Defendant filed an

answer and a counterclaim, seeking a declaratory judgment that the works at issue were obscene. (Pet. Cert. App. 26).

The parties had agreed that the obscenity issues should be adjudicated in a civil declaratory judgment action, rather than in a criminal prosecution. (Pet. Cert. App. 5) (23:16-24:11 in the Record).

The Plaintiff, through its Vice President Terry Tippit, operated The Run Bar in Omaha. (31:11-32:13). Plaintiff had a liquor license covering the main floor, the back yard/dance floor, the disc jockey booth, and the basement of The Run Bar. (36:18-39:3). The basement contained a full bar, chairs for people to sit on, a pool table, etc. (39:4-10). The basement is depicted in photographs, Exhibits 23 and 24. (E23 and 24, 1:6, Box). Plaintiff displayed the works at issue in the basement, and desired to continue to do so. (33:21-35:25; 105:24-106:1).

These matters came to light when fire inspectors inspected the basement pursuant to Plaintiff's request for a certificate of occupancy. (Pet. Cert. App. 31-32) (11:3-12). The fire inspectors complained to the Omaha Police Department Vice Unit regarding the paintings on the wall of the basement. (8:7-11).

On December 13, 1994, Sgt. Ron Cole of the Vice Unit appeared at The Run Bar to investigate the complaint regarding the artwork. (7:25-8:11). He arrived at about 10:00 p.m., when the bar was open, and walked into the bar. (8:12-18). Sergeant Cole viewed the art works in the basement, and seized three art works that he suspected to have violated the pornography laws for the State of Nebraska. (9:23-10:9). Those three works are depicted in

Exhibits 1, 2, and 3. (10:10-17) (E1, E2, and E3, 1:6, Box). The works depicted in Exhibits 1, 2, and 3 were returned to the Plaintiff, with the understanding that they would not be displayed pending resolution of this action. (24:2-18; 34:17-24).

This action was tried in district court on May 5, 1997. Prior to trial, the parties and the court discussed the nature of the case and what burden of proof would be applicable. The Defendant argued that each party should prove its own case by a preponderance of the evidence, as with any other civil case. (4:8-14). The district court ruled that the case was analogous to a criminal prosecution, and held that the Defendant would be required to prove that the materials were obscene, beyond a reasonable doubt, as in a criminal proceeding. (2:20-3:20; 4:15-23). The Plaintiff concurred with that ruling by the district court. (5:13-18).

At trial, Sergeant Cole, the Defendant Conboy, and Terry Tippit testified as to the aforementioned display, seizure, and return of the art works. The Defendant Conboy also described the resolution that resulted in the filing of this action. (23:16-24:11).

The only other trial testimony came from the Defendant's expert witness, Dr. Roger Aikin. Dr. Aikin was the chairman of the Department of Fine and Performing Arts at Creighton University. (44:25-45:1) (E25, 1:51, 51a). Dr. Aikin reviewed the photographs of the 22 subject works, with the intent of appraising what, if any, serious artistic value they had. (53:5-13).

Dr. Aikin described two ways of determining whether a certain work had serious artistic value. One

way would be to look within the "four corners" of the work itself and evaluate such elements of art as line, shape, color, form, and balance. If the work had "quality" in these elements it could have serious value. (54:15-55:4).

Dr. Aikin stated that a second way would be to look at the larger context of the work, and whether it was displayed in a "serious venue". (55:5-13). This contextual approach was conceived by an aesthetics professor named George Dickey, and focused on the "judgment of the art world" as to a work. (56:20-22). This resulted in a "reasonably objective judgment" in that the venue of the work was clear-cut. (56:23-25). Under this analysis, the venue of a work is of vital importance to its value. (57:10-58:1). This contextual approach has been accepted and used by art experts. (58:2-10).

Dr. Aikin opined that, based on the formal qualities within the four corners of the works, the subject works lacked any serious artistic value. (64:14-66:20). He would not personally advocate for the inclusion of any of the 22 works in an art exhibit in Omaha. (66:21-67:5). He would not use any of the works in teaching any of his classes, except perhaps in a discussion of obscenity. (67:19-22). There would be no reason to include any of the works in any art books or publications. (67:23-68:1). Dr. Aikin would be "very surprised" to see any of the works displayed in any serious art exhibition in Omaha. (68:2-5).

Similarly, Dr. Aikin stated, the works at issue fail the Dickey test of serious artistic value. After examining the venue of the display, as depicted in Exhibits 23 and 24, Dr. Aikin stated that he "would not consider these works of art as having any serious value". (61:24-62:2). He noted

that "[t]his is probably the worst environment for art works I've ever seen". (62:18-19). The venue caused Dr. Aikin "to question whether the owners of the work value them themselves". (62:12-14). He added that "pool cues and art works don't mix". (62:11-12).

Plaintiff did not present any expert opinion evidence as to serious artistic value. Plaintiff did offer, and the court did receive, over relevancy objections, Exhibits 28 through 33, consisting of various depictions of art works with themes of nudity. (E28-33, 1:78, 81, 85, Box). There is no evidence tying Exhibits 28 through 33 to any local contemporary community standards.

The district court also received, over a relevancy objection, a copy of Hustler magazine. (E27, 1:21, Box). Again, there was no evidence tying Hustler magazine to any contemporary community standards, other than the mere fact that the Defendant had not yet criminally prosecuted its sale, and it had not been "removed" from any Omaha bookstores. (16:10-12; 26:14-27:7).

Plaintiff also offered two videotapes as Exhibits 34 and 35, which were rejected as evidence by the court. (112:3-25) (E34 and 35, 1:112, Box).

In its December 29, 1997 judgment order, the district court found that the works depicted in Exhibits 1, 2 and 3 were obscene, and that the works depicted in Exhibits 4 through 22 were not obscene. Pursuant to Neb. Rev. Stat. §28-818 (Reissue 1995), the district court ordered that the works depicted in Exhibits 1, 2 and 3 be surrendered, removed, or destroyed. (Pet. Cert. App. 42-43). From that order, Plaintiff appealed to the Nebraska Court of Appeals. The Nebraska Supreme Court heard the case,

after ordering that the case bypass the Nebraska Court of Appeals. (Pet. Cert. App. 4). The Nebraska Supreme Court affirmed the trial court's decision (Pet. Cert. App. 1). Plaintiff now seeks a writ of certiorari from the United States Supreme Court.

ARGUMENT

I.

THIS CASE DOES NOT INVOLVE ANY IMPORTANT FEDERAL QUESTION REQUIRING REVIEW FROM THIS COURT.

This case involves the application of Nebraska's obscenity statute to three works sought to be displayed by the Plaintiff. There is no allegation that the Nebraska statute violates the United States Constitution. There is no allegation that any action of the Defendant violated the Constitution (Pet. Cert. App. 44-46).

United States Supreme Court Rule 10 describes the considerations governing the grant of writs of certiorari. Rules 10(b) and (c) involve certain decisions on "important federal question[s]". Rule 10 adds that a petition for a writ of certiorari is "rarely granted" for "erroneous factual findings or the misapplication of a properly stated rule of law".

The latter is the situation in the present case. Plaintiff at page 15 of its Petition for Writ of Certiorari argues that "[a]lthough the [Nebraska Supreme] Court adopted this Court's three-part test enunciated in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), it did

not properly apply those principles to the instant case". This alleged "misapplication" should not be the basis for the granting of a writ of certiorari.

Furthermore, the issues framed by the Plaintiff do not directly involve an important federal question. Plaintiff filed its petition for a declaratory judgment in Nebraska state court (Pet. Cert. App. 44). It sought a judicial determination under Neb. Rev. Stat. §28-820 (Reissue 1989) that certain works were not obscene under Nebraska's obscenity statutes. *Id.* There was no allegation that Nebraska's obscenity statutes were unconstitutional in any respect, and no allegation that the Defendant or his agents acted in violation of the Constitution (App. 44-46).

Indeed, the definition of obscenity under Nebraska statutes is similar to that enunciated by this Court in *Miller*. Nebraska's definition of obscenity is found at Neb. Rev. Stat. §28-807(10) (1995). That definition employs essentially the same three-prong definition as was stated in *Miller*. There apparently has been no reported case finding the latter statute to be unconstitutional, and petitioner does not appear to argue so.

In seeking grounds for this Court's review, Plaintiff does cite two grievances with the Nebraska Supreme Court opinion in this case. Those two grievances will be discussed in sections II and III below.

II.

THE NEBRASKA SUPREME COURT'S ALLEGED FAILURE TO "ARTICULATE" THE CONTEMPORARY COMMUNITY STANDARD IS NOT A BASIS FOR THE GRANT OF A WRIT OF CERTIORARI.

Plaintiff first argues that a writ of certiorari must be granted because the Nebraska Supreme Court allegedly failed to "articulate" the contemporary community standard. See Plaintiff's petition at pages i, 15. However, this argument misapprehends the proper role of the Nebraska Supreme Court as an appellate court.

As noted above, the three-pronged obscenity definition in Neb. Rev. Stat. §28-807(10) (Reissue 1995) closely tracks with the definition of obscenity pronounced in *Miller v. California*, 413 U.S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973). It is clear that the first "prurient interest" prong is to be considered with reference to contemporary community standards. See, Neb. Rev. Stat. §28-807(10)(a); *Miller*, 413 U.S., at 24, 37 L. Ed. 2d 419, 93 S. Ct. 2607. The finder of fact must also measure the "patently offensive" prong against contemporary community standards as well. *Smith v. United States*, 431 U.S. 291, 301, 52 L. Ed. 2d 324, 97 S. Ct. 1756 (1977). The fact finder's determinations of these two prongs are "essentially questions of fact". *Jenkins v. Georgia*, 418 U.S. 153, 159, 41 L. Ed. 2d 642, 94 S. Ct. 2750 (1974).

The contemporary community standards are to be applied by the triers of fact "in accordance with *their own understanding* of the tolerance of the average person in their community". *Smith*, 431 U.S. at 305 (emphasis added). In so doing, the triers of fact are to consider their

"entire community". *Id.* This is analogous to a juror's determination of what is "reasonable" conduct in the context of a negligence action:

> A juror is entitled to draw on *his own knowledge* of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law.

Hamling v. United States, 418 U.S. 87, 104, 41 L. Ed. 2d 590, 94 S. Ct. 2887 (1974) (emphasis added).

Thus, in the present case the trier of fact – the Douglas County District Court judge – was to resolve the first two prongs of the obscenity definition with reference to his own understanding of the contemporary community standards in his community. The trier of fact must rely on his own knowledge, and not on any "abstract formulation" of the contemporary community standard. *Jenkins*, 418 U.S. at 159. The trier of fact was to evaluate the subject works, with reference to his own understanding of the contemporary community standards, in the same way as a juror would evaluate the reasonableness of the actions of a motorist in a motor vehicle negligence action.

Most significantly, neither Neb. Rev. Stat. §28-807(10), nor *Miller* and its progeny, require the trier of fact to "articulate" or "announce" any specific definition of contemporary community standards. Again, the focus in an obscenity case is not to articulate or promulgate some "abstract formulation" of the contemporary community standards. Rather, the duty of the trier of fact is simply to

decide the case, with reference to his or her understanding of the contemporary community standards. Just as jurors in a motor vehicle negligence case are not required to state the basis for their decision, the trier of fact in an obscenity case is not required to write out a definitive statement of the contemporary community standards.

However, it is the Nebraska Supreme Court, and not the trial court, whom the Plaintiff faults for failing to "articulate" a contemporary community standard. A state court of last resort has even less of a duty to articulate or promulgate a contemporary community standard than does the trier of fact. If a state court of last resort were to formulate its own perception of the contemporary community standard, such a practice would effectively eviscerate the role of the trier of fact in considering his or her own understanding of the contemporary community standard. More specifically, the contemporary community standard, as understood by the Nebraska Supreme Court seated at the state capital in Lincoln, Nebraska, may well be different from the contemporary community standard understood by the trier of fact seated in the relevant locality in Omaha, Nebraska. The very nature of a contemporary community standard is antithetical to the de novo reformulation of the standard at the state supreme court level.

In *Smith v. United States*, 431 U.S. at 305, this Court listed some appropriate topics for appellate review in obscenity cases. It was noted that juries must be "instructed properly". *Id.* The type of conduct depicted must fall within the "substantive limitations" suggested in *Miller* and its progeny. *Id.* The work must lack serious

literary, artistic, political, or scientific value. *Id.* The sufficiency of the evidence could be reviewed. *Id.* This Court did not appear to suggest that it was appropriate for an appellate court to reformulate and articulate its own perception of the contemporary community standard. The Defendant is unaware of any such suggestion by this Court, and the Plaintiff does not appear to cite any such suggestion by this Court.

Grant of a writ of certiorari cannot be based on any supposed failure by the Nebraska Supreme Court to articulate a contemporary community standard.

III.

THE RELIANCE ON EXPERT TESTIMONY ON SERIOUS ARTISTIC VALUE DOES NOT REQUIRE THE GRANTING OF A WRIT OF CERTIORARI.

The Plaintiff's second argument is that the Nebraska Supreme Court allegedly improperly "reli[ed] on expert testimony to determine whether the allegedly obscene material lacked serious artistic value". Plaintiff's petition at page i. The Plaintiff argues that the Court's opinion "established precedent that the determination of whether a work of art is obscene or entitled to First Amendment protection depended on where the work was displayed". Plaintiff's petition at page 19. However, expert testimony on this issue was appropriate, and the Plaintiff misstates the precedential holding of the Nebraska Supreme Court.

This issue involves the third prong of the obscenity definition under Neb. Rev. Stat. §28-807(10) and *Miller*: whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. Expert testimony is

not necessary to satisfy this prong of the definition. See, *Hamling v. United States*, 418 U.S. 87, 105, 41 L. Ed. 2d 590, 94 S. Ct. 2887 (1974); *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 56, 37 L. Ed. 2d 446, 93 S. Ct. 2628, (1973). However, this does not imply that expert testimony is inadmissible or of no consequence. To the contrary, expert testimony as to serious artistic value is worthy of consideration by the trier of fact and by the appellate court. See, *e.g., Luke Records, Inc. v. Navarro*, 960 F.2d 134 (11th Cir. 1992).

In the present case, the only expert testimony was submitted by Dr. Roger Aikin, on behalf of the Defendant. Dr. Aikin was the Chairman of the Department of Fine & Performing Arts at Creighton University, and served in various capacities with the Creighton Art Gallery (Pet. Cert. App. 20). Dr. Aikin testified to two alternative methods of evaluating the serious artistic value of a particular work. One method was by a "four corners" test, evaluating such criteria as space, composition, design, color, harmony, form, and balance (Pet. Cert. App. 20). The alternative "Dickey" analysis considers where the art has been exhibited as well as whether the work, or the artist, has achieved a certain degree of respect and recognition in the artistic community (Pet. Cert. App. 20-21). Dr. Aikin testified that *under either analysis*, the three works at issue did not possess any serious artistic value (Pet. Cert. App. 21-22). Dr. Aikin's opinions were uncontradicted and were not objected to (Pet. Cert. App. 23).

The Nebraska Supreme Court found that while it was "not bound to accept Dr. Aikin's expert testimony", his testimony was "of assistance" in its de novo review of the

serious artistic value issue (Pet. Cert. App. 22). The Court did not say what aspects of Dr. Aikin's testimony were "of assistance".

In this context, it is impossible to say that the Nebraska Supreme Court opinion stands as precedent for the proposition that the serious artistic value issue can be determined by reference to where the work was displayed. The Court simply did not say that. The Court did not state which analysis or which part of Dr. Aikin's testimony was "of assistance". The Court could well have been guided by Dr. Aikin's comments under the "four corners" analysis. Indeed, the Court stated that the subject works "have no serious artistic value, *regardless of the analysis employed*" (Pet. Cert. App. 22) (emphasis added).

Similarly, there is no showing that the Nebraska Supreme Court deviated from the "reasonable person" standard discussed in *Pope v. Illinois*, 481 U.S. 497, 107 S. Ct. 1918, 95 L. Ed. 2d 439 (1981). Indeed, Dr. Aikin's testimony gave articulation to standards that could have been used by any reasonable person in an evaluation of the works. He supplied the "reasons" behind the thoughts of the "reasonable" person. It would not have been error to infer a relationship between the two, if that is in fact what the Nebraska Supreme Court did without saying so.

CONCLUSION

For the above reasons, the Defendant urges the Court to deny Plaintiff's petition for a writ of certiorari.

Respectfully submitted,

PAUL D. KRATZ, No. 12318
City Attorney
ALAN M. THELEN, No. 17811
Assistant City Attorney,
Counsel of Record
804 Omaha/Douglas Civic Center
1819 Farnam Street
Omaha, NE 68183
(402) 444-5115
Counsel for Respondent